APR 8 1993

No. 92-1439

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1992

HAROLD LAYTON,
Petitioner
v.
GARRARD COUNTY FISCAL COURT
and RAY HAMMONDS, Judge-Executive,
and ARNETT METCALF, County Treasurer,
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

In the Counterstatement to the Questions Presented, respondents suggest that "petitioner is limited on appeal to that issue determined at summary trial as to the nature of the office of county treasurer and tax administrator following his own motion for summary judgment" (p. i, item II; pp. 10-11).

Respondents have routinely sought to evade misconduct charges, but this is the first substantive appearance of this argument.

Petitioner's motion for summary judgement (Trial Record 125-126) relies on the "entire record", and *attached to that motion, when it was filed*, was petitioner's affidavit reporting respondent Hammonds' retributive motive (Petition, pp. 27a-28a, Trial Record 127), which was never denied by respondents.

Petitioner's Brief for Plaintiff in Support of Motion for Summary Judgement was filed simultaneously with the motion for summary judgment. An excerpt is attached hereto (pp. 1a–2a). There, petitioner urges that respondents not be allowed to advance a defense of compelling government interest when the only motive stated by respondents before petitioner brought suit was retribution directed at Layton's relatives.

When respondents sought new trial in Garrard Circuit Court, petitioner introduced the evidence of procedural misconduct regarding the January appointment of respondent Metcalf and the failure of respondents to dismiss petitioner, or hire another, as tax administrator (Trial Record 281-396). This mate-

rial was formally presented as a basis to deny a new trial, and Garrard Circuit Court denied same.

The evidence for misconduct was recapitulated for the Kentucky Court of Appeals and the Kentucky Supreme Court, and it was formally presented to both courts that misconduct, having in this case violated the Fourteenth Amendment, provided an independent basis to affirm Garrard Circuit Court.

In *American Jurisprudence* it is asserted that,

> According to the essence of its function, an appellate court is concerned with whether the holding, and not whether the reasoning, of the decision appealed from is correct, and generally a correct decision will not be disturbed on appeal because it is based on an incorrect ground, *especially where the correct ground was formally presented to the court below, though not there acted upon,* and the view has also been taken that in a proper case a correct decision should be sustained even though the appellate court finds it necessary to resort to a theory not presented to the court below (5 *Am. Jur.* 2d, Appeal and Error, §727, p. 170, emphasis added).

Even though this principle of law has been affirmed in Kentucky (see, e.g., *Haddad v. Louisville Gas & Electric Co.* (Ky) 449 SW2d 916 (1970)), there is no evidence that the appellate courts of Kentucky made any effort to honor this principle. Because the charges and evidence of misconduct were fully documented in Garrard Circuit Court, and preserved throughout litigation in Kentucky, they are preserved for this Court.

Petitioner's objection to respondent's attempt to evade charges of misconduct should not be construed to diminish the confidence petitioner places in the reasoning of Garrard Circuit Court, which relied on the standards of *Elrod*, *Branti*, and *Rutan* (Petition, pp. 8, 15). In the Brief in Opposition, respondents continue to shift from these standards, relying instead on diffuse "concepts of confidence, discretion, authority, and involvement in the development of fiscal policy" (e.g., Brief in Opposition, pp. x, 3, 9, 12, 15, 16).

This shift leads respondents to confuse the degree of responsibility with the *nature of the responsibilities*, and to confuse the confidence placed in the treasurer, and the confidential tax records in his custody, with *political confidentiality*. Petitioner submits that the Court should not condone these errors, since the net of the exceptions of *Elrod* should not be cast "too wide to allow [lack of] political support to be used to extrapolate a tendency to breach a sworn duty, behave unprofessionally, or commit criminal acts" (*Meeks v. Grimes*, 779 F.2d 417, 421 (7th Cir. 1985)).

Moreover, respondents persist in magnifying the role of treasurer. For example they interpret KRS 68.020 (3) contrary to its plain meaning when asserting that the treasurer, acting entirely on his own initiative, can bring suit against delinquent parties (Brief in Opposition, p. 7).

Respondents bring forth a third Question: "Whether jurisdiction in the Court is foreclosed by the separation of powers doctrine as to offices and officers like that in the instant case" (p. i, item III; pp. 11-18).

Here is petitioner's view of the matter:

Under KRS 68.010, Garrard Fiscal Court has substantial freedom, every four years, in June, to appoint a competent, honest, and industrious person to serve as county treasurer.

But the power to appoint is not absolute. Rather, that power must be exercised in substantial compliance with lawful procedure and in conformity with constitutional principles. The power to appoint does not legitimize an appointment made by just *any* process, or for just *any* reason. Specifically, the power to appoint should not confer on a member of Garrard Fiscal Court the authority to coerce and manipulate an appointment to pursue a private grievance. And the power to appoint should not, by itself, legitimize a patronage practice that would otherwise be prohibited by *Rutan* and its precedents.

The entry of the Attorney General of Kentucky at this juncture demonstrates the significance of this case to a state in which arbitrary employment and appointment practices commonly prevail at all levels of state and local government.

The appellate courts of Kentucky have sanctioned an abuse of power, and the Attorney General of Kentucky has joined in its defense. Our judicial system fails this petitioner if he cannot find refuge in the Supreme Court of the United States.

Respectfully submitted,

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5 April 1993

APPENDIX

From the Record
Filed 1 September 1990

Excerpt from Petitioner's
BRIEF FOR PLAINTIFF
IN SUPPORT OF MOTION FOR SUMMARY
JUDGEMENT
(Trial Record 84–85)

The plaintiff [Petitioner Layton] has filed his supporting Affidavit in this case concerning his meeting with County Judge Executive, and statements made by Judge Hammonds: he did not say that Arnett Metcalf was hired as a political reward, nor did he say that he thought Harold Layton's work was in any way deficient or that he would have some difficulty working with him, to the contrary saying that he would have been willing to work with him, nor did he say that Harold Layton would have worked to thwart the goals of his administration, nor saying that it was necessary to have a chosen appointee to ensure the effective performance of the Treasurer's duties.

What the Harold Layton Affidavit shows that Judge Hammonds did say is that Harold Layton was being dismissed

because of what his relatives did, and that he, the County Judge Executive, was under pressure to deliver retribution to "anyone connected to the Laytons" although not because of any action Harold Layton took. Judge Hammonds' remarks imply that he believed that Harold Layton had some reasonable expectation of reappointment, and, since Harold Layton was the County Judge's second choice, the Judge must not have known of any reason why he could not work with him.

The point here is that the justification for the dismissal now advanced by the defendant is all developed after-the-fact and has nothing to do with the true intent and motivation, as a mere condition and not a cause for the replacement of Layton by Metcalf, hence defendants should not be allowed to concoct a defense of compelling or vital government interest, when the truth is shown by piercing the corporate or body politic shield as it were that the sole, ulterior motive and purpose was to make all Laytons open season.